

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

TREMAINE WINDHAM,

Defendant.

8:14CR186

MEMORANDUM AND ORDER

This matter is before the court on defendant Windham's objection, [Filing No. 52](#), to the Findings and Recommendation ("F&R") of the magistrate judge, [Filing No. 49](#), on defendant's motion to suppress identification evidence, [Filing No. 39](#). The defendant is charged with conspiracy to possess with intent to distribute Oxycodone in violation of [21 U.S.C. § 846](#). [Filing No. 1](#), Indictment.

The defendant challenges an out-of-court identification; to wit, an unmarked photo of Windham shown by law enforcement officers to a confidential informant who positively identified Windham as the person from whom she purchased the drugs. [Filing No. 39](#), Motion to Suppress. He contends that the showing of a single photograph of the defendant to the perspective witness was unduly suggestive, highly prejudicial and unreliable and that this procedure created a substantial likelihood of irreparable misidentification of the defendant. *Id.* After a hearing, the magistrate judge recommended denial of the motion. [Filing No. 49](#), F&R; [Filing No. 54](#), Transcript at 19-20.

Pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), the court has conducted a de novo determination of those portions of the F&R to which the defendant objects. [United](#)

States v. Lothridge, 324 F. 3d 599, 600-01 (8th Cir. 2003). The court has reviewed the entire record, including the transcript of the suppression hearing. See [Filing No. 54](#), Transcript. The court accepts the facts set out by the magistrate judge and they need not be repeated here, except to the extent necessary to this court's findings. *Id.* at 17-19.

Briefly, the evidence shows that a confidential informant made a controlled buy in January, 2014. *Id.* at 6. A law enforcement officer observed a black male at that time. *Id.* at 7. The confidential informant later reported that the source for the pills was a black male in a wheelchair. *Id.* The confidential informant set up a second buy to occur at the defendant's house. *Id.* at 7-8. Law enforcement officers observed the transaction, saw the defendant and identified him through a database linked to the address. *Id.* at 8, 13. They obtained a photo of the defendant in a wheelchair in the NCJIS database. *Id.*; see [Filing No. 47](#), Index of Evid., Ex. 1. Approximately seven days later, the confidential informant was shown the photo and identified the defendant. *Id.* at 10. The government concedes that it could have obtained photo lineup and admits the photo lineup was impermissibly suggestive. *Id.* at 4, 18. The magistrate judge found that, although impermissibly suggestive, under the totality of the circumstances, the suggestive photo array did not create a very substantial likelihood of irreparable misidentification. *Id.* at 18-20.

The court agrees with the magistrate's conclusions. In the Eighth Circuit, even if an identification procedure is suggestive, "suppression of the resulting identification is not the inevitable consequence." [United States v. Hickman](#), 764 F.3d 918, 922-23 (8th Cir. 2014). Instead, the court must "evaluate 'whether improper police conduct created

a 'substantial likelihood of misidentification.'" *Hickman*, 764 F.3d at 922-23 (quoting *Neil v. Biggers*, 409 U.S. 188, 201 (1972)). Courts "consider 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [his or her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'" *Hickman*, 764 F.3d at 923 (quoting *United States v. Williams*, 340 F.3d 563, 567 8c 2003). Under the circumstances, the court agrees with the magistrate judge's determination that the suggestive procedure did not create a "substantial likelihood of irreparable misidentification." The identification by the confidential informant merely corroborated information already known to law enforcement. Accordingly, the court finds the defendant's objections should be overruled, the F&R should be adopted, and the motion to suppress should be denied.

IT IS ORDERED:

1. Defendant Windham's objections to the F&R ([Filing No. 52](#)) are overruled.
2. The Findings and Recommendation of the magistrate judge ([Filing No. 49](#)) is hereby adopted.

3. Defendant Windham's motion to suppress ([Filing No. 39](#)) is denied.

Dated this 5th day of February, 2015.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge